Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-722

REZEN D. AUSTIN,

Petitioner,

versus

BERRY BROTHERS OIL FIELD SERVICE, INC., AND TRAVELERS INSURANCE COMPANY,

Respondents.

Petition for a Writ of Certiorari or Extraordinary Writ to the United States Court of Appeals for the Fifth Circuit

William P. Rutledge
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Lafayette, Louisiana 70501
Attorney for Petitioner

OF COUNSEL:
Domengeaux & Wright
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. _____

EX PARTE AUSTIN

MOTION FOR LEAVE TO FILE FOR EXTRAORDINARY WRIT OR IN THE ALTERNATIVE PETITION OF CERTIORARI

R D. Austin respectfully moves the court for leave to file this petition for the appropriate extraordinary writ, mandamus or otherwise, or in the alternative seeks to file this petition as one for certiorari; and that any rules deemed necessary issue thereunto to the Honorable Court of Appeals for the Fifth Circuit or the Honorable Panel thereof in this cause.

William P. Rutledge
Attorney for Petitioner
320 West Main Street
Lafayette, Louisiana 70501

CERTIFICATE

I, the undersigned member of the Bar of the United States Supreme Court, certify that this petition and motion have been served in three copies upon the Honorable Robert A. Ainsworth, Jr., Judge, Room 415, 400

Royal Street, New Orleans, Louisiana 70130; the Honorable John C. Godbold, Judge, 410-14 Post Office Building, Box 1589, Montgomery, Alabama 36102; and the Honorable Griffin B. Bell, Judge, 240 Old Post Office Building, Box 845, Atlanta, Georgia 30301; constituting the Honorable Panel of the Court of Appeals in this cause by mail and as required by law; and upon Harold Rhodes, Esquire, 292 Lima Street, Berwick, Louisiana 70342 and Phillip Henderson, Esquire, Box, 590, Houma, Louisiana, 70360, attorneys for Respondents this ____ day of November, 1971.

William P. Rutledge

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. ____

REZEN D. AUSTIN,

Petitioner,

versus

BERRY BROTHERS OIL FIELD SERVICE, INC. AND TRAVELERS INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI OR ALTERNATE WRIT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. D. Austin respectfully petitions the Court to review by certiorari, or by other appropriate writs, the judgment of the United States Court of Appeals for the Fifth Circuit dated September 1, 1971, and apparently entered on the same date.

OPINIONS

District Court's Opinion: Appx. A. p. 1a Unreported order denying plaintiff's motion to set aside under rule 62(b) a summary judgment.

Opinion of the Court of Appeals: Appx. B, p. 6a affirming the order.

ORDERS AND JUDGMENT

Judgment of the Court of Appeals dated September 1, 1971, apparently entered the same date, Appx. C, p. 7a.

JURISDICTION

Original jurisdiction, 28 U.S.C. Sec. 1331, Admiralty. 28 U.S.C. Sec. 1254 (1) invokes this Court's jurisdiction.

QUESTION

Can the Court of Appeals satisfy its statutory duties, and at the same time give the appellant due process and equal protection of the law by a rendition of a one-word judgment that tells appellant what happened but not why and gives him no way to figure out why himself through a process of deduction?

The case is briefed: There is no hearing, no opinion, no comment, and no citation except of a case which says, in bootstrap manner, that the Court of Appeals for the Fifth Circuit has the power to do this, enter a one-word opinion that merely says, "Affirmed." And then impliedly, "See case where we say we can do this."

CONSTITUTIONAL PROVISIONS

14th Amendment:

> "... nor shall any state deprive any person of life, liberty or property without due process of

law; or deny to any person within its jurisdiction the equal protection of the law ..."

5th Amendment:

"No person shall . . . be deprived of life, liberty or property, without due process of law ...." (Thus making the equal protection clause applicable to the federal government.)

STATUTES

28 U.S.C. Sec. 46 (c):

"Cases in controversy shall be heard and determined by a Court (of Appeals) ...."

REASONS FOR WRIT

The writ should be granted to determine whether the intermediate court has satisfied its statutory duty to hear and determine cases, and any constitutional duty placed upon it to do so, by a one-word affirmance which tells the appellant nothing more than the literal statement that the trial court committed no error of law. This, in a case where the appeal raises several points of law on whether the trial court has abused its discretion. The result is that in coming to this court for certiorari, appellant must brief every conceivable point of law that may have gone against him. (In dead seriousness, the appellate decision is like the office seeker's literal reply to why he lost the election: Did not get enough votes. Here, the most that can be made out of the one-word affirmance is "The trial court did not abuse its discretion because it did not commit any error of law."

ARGUMENT

Plaintiff filed a motion to vacate a final judgment under rule 62(b). Appx. D, p. 8a The motion was cast upon more than one ground. The trial court denied the motion. In doing so, it enumerated several findings of fact or opinions and possibly some conclusions of law but did not expressly state which it was basing its denial upon or whether upon all. Plaintiff appealed upon the general ground that the denial was an abuse of discretion: Plaintiff set forth several reasons or specifications, any one or more of which plaintiff contends would constitute an abuse of discretion. (The motion is to reopen a maritime case of personal injury on the grounds or misrepresentation, innocent or otherwise, which may have mislead counsel to abandon the case; or in the alternative, abandonment of the case by counsel under circumstances warranting a reopening regardless of the misrepresentation.)

Whether erroneous or not, the affirmance by the Court of Appeals could have gone off on one, more, or possibly all of several points, such as that there was no equity in the motion (innocent misrepresentation not sufficient to warrant vacation); that there were overriding counter-equities (lack of diligence or laches on the part of plaintiff's counsel); that if the motion contained a meritorious theory of recovery, the supporting affidavits were not sufficient factually to make it out prima facie as a matter of law; that if the motion had equity, it failed to present prima facie a meritorious cause of action (dockside gear, dockside injury under theory of unseaworthiness); that

if the motion showed both equity and prima facie meritorious cause of action, it should still be denied on the grounds of an absolute legal bar in the form of an affirmative defense to the cause of action patent from the face of the record (the effect of shoreside "state compensation" settlement.)

Petitioner considers all of such grounds erroneous, but has no way to tell which of them, or if all of them were involved.

We do not seek a broad sweeping rule. There may be cases where "affirmed" tells us everything we need to know or have a constitutional right to hear about why the appellant is forever out of court; such as the case raising an indirect evidential question (the evidence is insufficient to prove an indispensable prerequisite to judgment, or conversely, that the evidence is conclusive on that point.) But in Austin's case, many points and questions were raised. For example, the trial court confused depositions taken *after* summary judgment supporting the motion to vactate with depositions taken *before* summary judgment. This was merely a mechanical oversight but the timing of these depositions in relation to the judgment appellant considered of significant if not crucial importance.

The effect of this procedure in such a case is plain. If petitioner is entitled to relief as an appellant, then he can obtain it only by lodging a petition for certiorari that amounts to an appellant's brief in this court. It is otherwise impossible to draw a petition of certiorari from the one-word opinion.

Briefs were lodged. There was neither argument nor an opinion nor a citation except a reference to a case to the bootstrap effect that the Court of Appeals had the power and right to follow such procedure; that is, affirm in one word with nothing else although the points in the case and posture of the case were of such a nature that the appealing party cannot, by any process of deduction, see what ground or grounds the judgment of the Court of Appeals is based upon. This, notwithstanding 28 U.S.C. Sec. 46 (c) which mandates:

> "Cases and controversies shall be heard and determined by a Court (of Appeals) ...".

It is petitioner's brief that due process and this statute require more than one word telling an appellant that he has lost in a case where he cannot figure out from the posture of the case why. He is entitled to at least a per curiam, if only one sentence or phrase, or merely one citation which he can use to make the determination by deduction.

In taking this position, petitioner is mindful that this Court grants certiorari and at the same reverses with only a citation in explanation. But petitioner submits that at the appellate level he is entitled to at least a citation or some sentence by which a person of normal intelligence could discern the implied opinion of the Court of Appeals.

Petitioner realizes that this Court dismisses or affirms appeals without elucidation. But generally there is an appellate opinion below or at least appellant can

figure out why because of the nature of the appeal. Petitioner's only, and sincere, answer to this is, that the Court of Appeals is not this court and that somewhere downstream he is entitled to an appellate opinion, terse though it may be, that let's him at least figure out "the determination" for himself.

Accordingly, petitioner prays for the appropriate writ directing the Honorable Court of Appeals for the Fifth Circuit to proceed to determination herein by an opinion sufficient for the foregoing purpose.

DOMENGEAUX & WRIGHT
P. O. Box 3668
Lafayette, Louisiana 70501

William P. Rutledge

Of Counsel:
Domengeaux & Wright
320 West Main Street
Lafayette, Louisiana

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

CIVIL ACTION
No. 13,481

REZEN D. AUSTIN

versus

BERRY BROS. OILFIELD SERVICE, INC., et al

FOR PLAINTIFF
Messrs.
Domengeaux, Wright & Bienvenu,
William P. Rutledge, Post Office
Box 3668, Lafayette, Louisiana

FOR DEFENDANTS
O'Neal, Waitz & Henderson,
Philip E. Henderson, Post Office
Box 590, Houma, Louisiana 70360,
FOR BOTH DEFENDANTS;

Harold J. Rhodes, 292 Lima St.
Berwick, Louisiana 70342,
FOR BERRY BROS.

R. J. PUTNAM, DISTRICT JUDGE

Filed: Jan. 28, 1971

MEMORANDUM OPINION

Plaintiff filed this suit under the Jones Act in 1967 claiming to be a seaman employed by the defendant and seeking compensatory damages for personal injuries allegedly sustained by him on June 3, 1964, as a result of the negligence of his fellow employees and the unseaworthiness of a work barge allegedly owned by defendant Berry Bros. Oilfield Service, Inc. Defendants moved for summary judgment, and we granted additional time to plaintiff and his attorneys to take the deposition of eight people to substantiate any possible claim against Berry Bros. that he was a seaman, or that he was working as a longshoreman at the time of his injury and the unseaworthiness of the barge was the cause of the accident. Thereafter, on the facts thus developed, being of the opinion that there was no way for plaintiff's suit to be sustained, we granted summary judgment against him on December 17, 1968.

The uncontradicted facts at that time and at the present time establish that this plaintiff was never a member of a crew of any vessel owned or operated by Berry Brothers as owner or as owner *pro hac vice*. He was sent from their yard at Morgan City to a yard owned by Phillips Petroleum Company to use a cutting torch in dismantling an offshore drilling platform which his

employers had purchased for scrap. The accident occurred while plaintiff was in the Phillips yard on land working from a suspended mat or platform, some thirty feet above the ground. Because the metal tubing which was being cut was under tension, when the plaintiff neared the end of the cut the pipe snapped and caused him to fall to the ground, injuring his wrist and feet. We granted a new trial, primarily because at the time of our original judgment on December 17 the court was under the impression that Berry Brothers did not own or charter any barges when the accident occurred, which was in error. As a matter of fact, the depositions then in the record disclosed that the defendant was the bareboat charterer or owner *pro hac vice* of a barge known as MR-12, which had been used on the job in question to transport the Lima 604 dragline from the Berry Brothers yard to the Phillips yard, for its use in the dismantling operation.

We found then, as we do now, that this fact made no difference in the outcome. The motion for a new trial was denied on February 12, 1969. Plaintiff was not assigned to the barge MR-12. His duties for defendant were primarily and predominantly performed on dry land. He had nothing to do with transporting the dragline to the Phillips yard by use of this barge, and the dragline itself was not an appurtenance of or affixed to the barge in any manner of speaking. Plaintiff drove to the Phillips yard on instructions from his superiors with a crew of men to cut this metal structure into pieces small enough for handling. The dragline was used to hoist a mat, on which plaintiff worked, so that he could cut from the top down. Assuming the

facts most favorable to plaintiff, that the pieces of scrap were to be loaded on the barge in question to be transported back to the Berry Brothers yard, the accident cannot be said to have been the result of an unseaworthy condition of the barge so as to entitle plaintiff to recover under the doctrine of *Reed v. Yaka*, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963). Assuming further that the dragline operator was negligent in slinging the mat from which plaintiff was required to work, as he was not a seaman or member of the crew of a vessel, there is no remedy for him under the Jones Act.

This court is acutely aware of the rule that employment status is a question of fact for the jury, as are the questions of unseaworthiness and negligence. Where, however, under the admitted facts of the case, we feel that we would be compelled to set aside a verdict allowing recovery, the formality of trying the matter to a jury would be pointless.

The record in this case will reflect that plaintiff has employed a succession of attorneys. He has settled his claim against his employer under the workman's compensation laws of this State, for the sum of $6,000.00. Now, some nine months after the case has been dismissed and a new trial denied, we are asked to vacate the judgment of dismissal under F.R.C.P. Rule 60. We have again reviewed the depositions, affidavits, and all tendered proof in this case and reach the same conclusion. We are reinforced in our belief that the facts as we have set them out above are substantially correct; and were uncontradicted at the time the judg-

ment of dismissal was entered, by the apparent effort made by plaintiff in his affidavit of November 4, 1969, to enlarge upon the testimony given by him under oath in his original deposition and to describe his job assignment on the day in question as part of a "loading plan" devised by the job foreman, and to characterize the "loading plan" as an unseaworthy condition of the barge in question. This affidavit consists almost entirely of conclusions, and is not sufficient, in our view, to cause this court to apply the curative provisions of F.R.C.P. Rule 60(b) (1), (3) and (6), upon which reliance is now placed, to vacate a judgment long since final and unappealable.

For the foregoing reasons, plaintiff's motion to vacate is denied.

IT IS SO ORDERED

Lafayette, Louisiana, January 28, 1971.

(Signed) R. J. PUTNAM
United States District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1503
Summary Calendar*

REZEN D. AUSTIN,
Plaintiff-Appellant;
versus

BERRY BROTHERS OIL FIELD SERVICE, INC., ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

(September 1, 1971)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F.2d 409.

[1]See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F.2d 966.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1503
Summary Calendar

D. C. Docket No. 13481

REZEN D. AUSTIN,
Plaintiff-Appellant,

versus

BERRY BROTHERS OIL FIELD SERVICE, INC., ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

---

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued As Mandate: September 1, 1971

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

REZEN D. AUSTIN

versus

CIVIL ACTION
#13481

BERRY BROTHERS OIL FIELD SERVICE INCORPORATED, ET AL

MOTION TO VACATE SUMMARY JUDGMENT

Plaintiff through undersigned counsel respectfully moves the Court to set aside the summary judgment dismissing his petition herein and to for leave file the accompanying counter affidavits and the deposition of Doyle Berry already taken, in opposition to said motion and to oppose same on such terms as may be just, under Rule 60 (b) for these reasons asserted severally, jointly and alternatively:

60(b) (1) Mistake, inadvertence and surprise on the part of counsel for defendants in connection with the ownership of the barge involved in this case; the type of work done by plaintiff; and his status;

60(b) (3) Unintentional misrepresentation on the part of the Statement of Fact of counsel for defendants in connection with the ownership of the barge;

60(b) (6) Any other reason justifying relief from the operation of the judgment as set up herein, including abandonment of the case by a firm of prior counsel for plaintiff; as shown in the accompanying affidavits and brief.

DOMENGEAUX, WRIGHT & BIENVENU
Attorneys for Plaintiff
Post Office Box 3668
Lafayette, Louisiana 70501

(Signed) WILLIAM P. RUTLEDGE
WILLIAM P. RUTLEDGE

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been duly served on opposing counsel, Mr. Philip E. Henderson, O'Neal, Waitz & Henderson, O'Neal Building, Houma, Louisiana 70360, by depositing same in the United States Mails, properly addressed, postage prepaid this 6th day of November, 1969.

WILLIAM P. RUTLEDGE

Please Serve:
Travelers Insurance Company.
Through the Secretary of State

Berry Brothers Oil Field Service, Inc.
(Martin Goodman Productions, Inc.)
Through Agent of Process — C T Corporation System, 1300 Hibernia Building, New Orleans, Louisiana 70112